Supreme Court, U.S.
FILED
SEP 23 1991
OFFICE OF THE CLERK

(3)

No.90-1793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AVON GROUP, INC.,

Petitioner,

vs.

STATE OF NEW YORK INSURANCE DEPARTMENT and WENDY E. COOPER, ACTING SUPERINTENDENT OF INSURANCE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner respectfully submits this brief in reply to respondent's opposition brief.

Statement of Rebuttal

INTRODUCTION

This petition is directed at the question of the United States District Court's dismissal, which precluded Avon's admiralty case from being decided in an admiralty court. It is respectfully requested that this case be remanded back to the District Court for a hearing on the admiralty issue alone. *See Petition for Writ at Page 5.*

This case centers around the New York State Insurance Department's interpretation of an ocean marine

insurance policy. No other insurance contract in existence covers against all risks from point of origin until final destination, at any location, of any description, anywhere in the world and in transit by any means of conveyance. An ocean marine insurance policy is based upon the utmost good faith and is ancient in its tradition. Such policies are traditionally exempt from regulation by the states. Ocean marine insurance policies are the most international of documents in their reach.

Both the Federalist Papers and the Constitution acknowledge admiralty supremacy and we hope the Supreme Court remembers that as well. New York State recognizes the need for national uniformity in admiralty matters and thus acknowledges ocean marine insurance as

exempt from its regulation. The dispute here surrounds the nature of the policy at issue and is clearly distinct from any question as to the state's power to tax.

The question as to the nature of the policy, taken alone, is subject to the admiralty jurisdiction of the federal courts. Respondent argues, and the District Court held, that the issue of interpretation is necessarily related to the issue of New York State's ability to tax. Petitioner seeks to realign the inquiry so that only the admiralty issue is given consideration.

Questions Presented

1. Do Federal Admiralty Courts have jurisdiction over this matter?

2. May Federal Admiralty Courts issue declaratory relief?

3. Should the Tax Injunction Act apply in this case?

Petitioner's position is that (1) this dispute is firmly within the admiralty jurisdiction of the federal courts, (2) only declaratory relief is being requested here and such relief is clearly within the purview of federal courts, New York State Waterways Ass'n v. Diamond, 469 F.2d 419, 421 n.1 (2d Cir. 1972), and (3) the Tax Injunction Act is inapplicable because (a) this is a dispute about the interpretation of an ocean marine insurance policy, not the "assessment, levy or collection of any tax under state law", 28 U.S.C. 1341, (b) the admiralty question is separate and apart from any issue as to the power of

the State to tax, and (c) admiralty is supreme. *See Petition for Writ at Page 28.*

Respondent's argument, woven into the morass of its opposition brief, appears to be that (1) this is not a maritime dispute, (2) even if it is cognizable under federal law, admiralty courts may not grant injunctive or declaratory relief, and (3) even if the requested relief is available, the Tax Injunction Act bars consideration by the federal courts.

Petitioner's argument, in relation to 28 U.S.C. 1341, is that the Tax Injunction Act is inapplicable because this dispute does not concern the imposition of a tax, but rather the interpretation of an insurance policy.

In order to reach this argument, Petitioner first addresses two threshold issues: (1) admiralty jurisdiction is present (2) declaratory relief is proper in admiralty actions.

(1) ADMIRALTY JURISDICTION IS PRESENT PURSUANT TO:

(a) The Constitution

(b) F.R.C.P. Rule 9(h)

(c) The Presence of An Admiralty Question

(a) Article III, Section (1) of the United States Constitution provides that the judicial power shall extend to "All cases of admiralty and maritime jurisdiction . . . " See *Petition for Writ at Page 25.*

That causes in admiralty are within the Judicial Power of Article III is clearly established. See *Petition for Writ at Pages 24-28.*

(b) A proper pleading need only sound in Admiralty. F.R.C.P. Rule 9(h) states: "If the claim is cognizable only in admiralty, it is an admiralty or maritime claim . . . whether so identified or not."

(c) Whether federal law governs in this matter depends on whether this case is within the admiralty and maritime jurisdiction conferred by the Constitution of the United States and jurisdictional statutes, Victory Carriers Inc. v. Law, 404 U.S. 202, 204.

Admiralty jurisdiction over contracts is determined by reference to the nature and subject of the contract and whether the injury complained of had the requisite maritime flavor, Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249(1972). The rule is well settled that ocean marine insurance is within the jurisdiction of the admiralty courts, *See Petition for Writ at Page 31.*

The issue in this case is whether or not a policy is indeed "ocean marine". The "nature and subject matter" of the contract at issue should be the crucial consideration in assessing admiralty jurisdiction. Exxon Corp. v. Central Gulf Lines, 111 S.Ct. 2071, 2076 (1991) quoting Insurance Co. v. Dunham, 11 Wall. 1, 26 (1871).

As the Court recently stated, "the fundamental interest giving rise to maritime jurisdiction is the 'protection of maritime commerce' ", Sisson v. Ruby, 110 S.Ct. 2892, 2898 (1990) quoting Foremost Insurance Co. v. Richardson, 457 U.S. 668, 674 (1982).

The Fifth Circuit, interpreting the requirements of Executive Jet *and* Foremost, *supra*, has fashioned criteria to decide the issue of maritime jurisdiction. These factors include: (1) the functions and roles of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and type of injury, and (4) the traditional concepts of the role of admiralty at law. Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). These were

later expanded by the Fifth Circuit to include: (a) the impact of the event on maritime shipping and commerce, (b) the desirability of a uniform national rule to apply to such matters, and (c) the need for admiralty expertise in the trial and decision of the case. Molett v. Penrod Drilling Co., 826 F.2d 1419, 1426 (1987).

Applying these considerations in the instant case, Petitioner feels it is abundantly clear that the nature of the insurance policy should be determined under the admiralty jurisdiction of the federal courts.

Respondent asserts that this is not a suit for breach of an ocean marine policy but rather a challenge to the exercise of the State's regulation of

the procurement of such policies and that as such is far removed from any maritime concerns. *See Brief in Opposition at Page 3.* Respondent not only misses the thrust of Petitioner's argument, but is wrong in its assessment of admiralty jurisdiction. Respondent is correct in that this is not a suit for breach of an ocean marine policy. But like such a suit, the issue here is the interpretation of an ocean marine policy. "The trend in modern admiralty case law . . . is to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime", Exxon v. Central Gulf Lines, 111 S.Ct. 2071, 2076 (1991). Certainly a determination as to whether a policy is ocean marine, given that ocean marine insurance under the contract theory is squarely within

federal jurisdiction, should be subject to federal court jurisdiction.

(2) DECLARATORY RELIEF IS AVAILABLE IN ADMIRALTY CASES

Petitioner does not object to Respondent's position that traditionally Admiralty Courts had "none of the powers of a court of equity", See *Respondent's Opposition Brief at Page 3.* Neither does Petitioner object to Respondent's assertion that "in modern times, federal courts in admiralty cases may issue declaratory relief", See *Respondent's Opposition Brief at Page 3, n.3,* citing New York State Waterways Ass'n v. Diamond, 469 F.2d 419, 421 n.1 (2d Cir. 1972). Thus, since Petitioner seeks no

injunctive relief in this action (See *Petition for Writ at Page 11, 29*), as is shown in the Petitioner's amended complaint to the district court (See Reply Addendum), the relief sought is available. (While Petitioner requested that the district court enjoin New York State in regards to putting Avon out of business by revoking Avon's license, no other injunctive relief was requested.)

(3) THE APPLICABILITY OF THE TAX INJUNCTION ACT IS NOT REACHED UNTIL THRESHOLD ADMIRALTY ISSUES ARE RESOLVED

(a) Petitioner is not asking the Court to rule as to the applicability of the tax by the state of New York, but only as to the nature of the policy at

issue. Thus 28 U.S.C. 1341 which applies to the "assessment, levy or collection of any tax under state law" is inapplicable. Once the nature of the policy is determined, there will be no issue as to the applicability of the tax. Thus this dispute has nothing to do with the assessment of a tax; only with the interpretation of the nature of an insurance policy. Therefore this is not, as Respondent claims, a request for declaratory or injunctive relief from a tax, See *Respondent's Opposition Brief at Page 3.*

Respondent cites Sipe v. Amerada Hess Corp., 689 F.2d 396 (3d Cir. 1982) for the proposition that no admiralty court has granted declaratory or injunctive relief from a tax. *Sipe* however dealt with a distinguishable

situation and was a request for a different type of relief.

In Sipe, as in California v. Grace Brethren Church, 457 U.S. 393 (1982), the issue was whether the state could legitimately collect unemployment taxes pursuant to the Federal Unemployment Tax Act. The issue in this case, unlike Sipe and California v. Grace Brethren Church, is related to the interpretation of a marine insurance policy not the taxing power of the state. For if the policy is determined not to be "ocean marine" then Petitioner has no argument with the Respondent.

Thus the instant case is distinguishable from the above-cited cases both in that it is unrelated to the "assessment, levy or collection of any

tax under state law" and because only declaratory relief is being requested.

While the determination as to the nature of this policy will necessarily affect New York State's decision as to whether or not to continue to enforce the tax, it is nevertheless a separate issue, cognizable in the federal admiralty courts. See *Petition for Writ at Page 56.*

If the policies are held to be ocean marine, New York will admittedly have no right to tax the policies at issue. The result, while being of the type the Tax Injunction Act seeks to avoid, is not prohibited by the Act because the means to reach such decision are separate from any issue as

to the "assessment, levy or collection" of a tax.

(b) As stated above, the Tax Injunction Act is only applicable to the "assessment, levy or collection of any tax under state law." Because the policies at issue in this case are related to foreign commerce they are exempt from tax under any of the state laws but are subject to the excise tax of the Federal Government.

The Tax Injunction Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a state to administer its own fiscal operations", Tully v. Griffin, Inc., 429, U.S. 68, 73 (1976). The principal purpose of the Act is to limit

drastically federal court interference with local tax matters, Rosewell v. LaSalle National Bank, 450 U.S. 503, 522 (1981).

Given that this is an issue of maritime law, with a particular maritime flavor, Executive Jet, supra, and that it is strictly limited to interpretation of an insurance policy, the concerns of the drafters of the Tax Injunction Act do not apply. Thus, this is not an appropriate instance to apply such.

While Petitioner is seeking to have the Court interpret the nature of the policy at issue and even though such interpretation will have the effect of indirectly determining the validity of the tax by the state of New

York, such interpretation is necessarily separate and distinct from any issue as to New York's taxing power.

(c) Admiralty questions must have supremacy over questions of state law in order to preserve the harmony and uniformity of maritime law. *See Petition for Writ at Page 28.*

Should the several states have exclusive jurisdiction over certain admiralty matters because of the application of the Tax Injunction Act, then the uniformity and national harmony in the application of admiralty matters nationwide will be interfered with. *See Petition for Writ at Page 1.*

CONCLUSION

The District Court as well as the Court of Appeals committed error as both failed to note the Admiralty and Maritime jurisdiction, and, further, erroneously placed total and complete reliance on the Tax Injunction Act without any diligent effort to fulfill the Court's obligation to hear and decide the facts and law of the case. A fair hearing would certainly have resulted in favor of the Petitioner on this motion.

The order and judgment of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

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REPLY ADDENDUM

(Copy from joint appendix Court of Appeals)

WHEREFORE, the Plaintiff seeks a Declaratory Judgment:

1. That the policy at issue is an ocean marine insurance policy.

2. That the jurisdiction of this Court is exclusive and binding upon the New York State Court as well as the New York State Insurance Department.

3. That the New York Insurance Department, its Superintendant and Excess Lines Supervisor, are bound to adhere to the ruling of this Court.

4. That the defendants be restrained and enjoined from taking further proceedings within the New York Insurance Department against AVON GROUP, INC.

as the Insurance Department not only threatens tax assessments, penalties and interest but also threatens that further proceedings will be instituted and in all probability those proceedings will be to suspend the Plaintiff's broker's license which will cause the Plaintiff irrevocable harm and loss of business and therefore the Restraint Order should be issued to prevent this result.

5. That this Decree of the Court of Admiralty not only binds the New York Insurance Department to the terms and conditions that the Court deems appropriate to foreclose any and all proceedings that AVON is now subject to or would be subject to in the future in respect to the matters herein set forth concerning the policy's character as an ocean marine insurance policy.